In the United States Circuit Court of Appeals For the Ninth Circuit

No. 5905

THOMAS JOHNSON,

Appellant,

vs.

CLARENCE R. HOTCHKISS, United States Marshal for the District of Oregon,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

Brief of Appellant

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Brief of Appellant

This is an appeal from an order of the District Court for the District of Oregon denying the application of Thomas Johnson for a writ of habeas corpus and ordering the removal of Johnson to the Northern Division of the Western District of Washington for trial.

THE FACTS

Thomas Johnson was arrested in Portland, Oregon, and brought before United States Commissioner K. F. Frazer for hearing upon a removal complaint. (Tr. 10-17.) Upon this hearing the government introduced in evidence a certified copy of an indictment theretofore returned in the United States District Court for the Western District of Washington. (Tr. 35.)

This indictment contained two counts. (Tr. 18-26.) The first count charged eight defendants, including one Thomas Johnson, with a conspiracy, alleged to have been formed in Seattle about December 1st, 1927, and to have continued up to the date of returning the indictment. Thirteen overt acts were charged in this count, each alleged to have been performed within the Northern Division of the Western District of Washington and collectively setting forth an overt act on the part of each defendant named in the indictment *except Thomas Johnson.* (Tr. 20-25.)

Count II of the indictment charged the same defendants with concealing smuggled liquor in the Customs Collection District of Washington in violation of Section 593 of the Tariff Act of 1922 (Tr. 25), on or about January 7, 1929.

Appellant here having entered a plea of not guilty and denying that he was the Thomas Johnson mentioned in the indictment (Tr. 34), the government called two witnesses to prove identity and show probable cause. One of these witnesses, R. E. Herrick, admitted that he had not been before the Grand Jury in Seattle and finally admitted that he could not say that appellant was the Thomas Johnson whom the Grand Jury had indicted. (Tr. 41.)

The other government witness, B. F. Hargrove, a Treasury Department special agent, who testified that he had conducted the investigation of the case and had appeared before the Grand Jury, on direct examination, categorically stated that appellant was the Thomas Johnson named in the indictment. (Tr. 65.) Hargrove was further allowed to testify that he had heard a conversation between Boyd (one of the defendants) and a man named Bisbee on December 28, 1928, in which the name of Johnson was mentioned. (Tr. 66, 67.) Also, that he had seen appellant once before on about March 15th, 1928, in Portland, Oregon, while he had one Chapman under surveillance. (Tr. 69.)

On cross-examination, Hargrove admitted that he had not seen appellant at all from March 15, 1928, until the date of the hearing. (Tr. 72.) He further admitted that he had never seen appellant in the State of Wash-

ington and had never seen appellant in conversation with any of the defendants named in the indictment. (Tr. 73.) Finally, he admitted that the name of Tom Johnson had not been used by Boyd in Seattle, as Hargrove had testified on direct. (Tr. 74.) Also, that he had never seen appellant with any whiskey. (Tr. 75.)

A number of witnesses were produced by appellant to negative probable cause. On his own behalf, he testified that he had lived in Oregon for nine years, and was not the person named in the indictment, and was not guilty of any of the offenses charged therein (Tr. 42, 43); that for the preceding two years he had been engaged in the business of hog raising on a farm at Yankton, Columbia County, Oregon, and during that period had raised some 10,000 hogs. (Tr. 44.)

Appellant further testified that he had not been in the State of Washington at any time during the period of the indictment (Tr. 44); that he knew none of the defendants mentioned in the indictment, and that he was personally acquainted with two other people in Portland, Oregon, whose names were Thomas Johnson, and whose addresses in that city he gave. (Tr. 45.)

Appellant further produced four of the defendants named in the indictment as witnesses. These men, J. Arthur Boyd (Tr. 50), Charles E. Broughton (Tr. 54),

Wilbur Charles Miller (Tr. 58), and Peter Poulas (Tr. 62), all testified that they never knew and never had seen appellant prior to the return of the indictment.

In addition, appellant produced a number of character witnesses. Police Inspector Archie F. Leonard testified that he had known appellant for several years (Tr. 84); that he was familiar with appellant's ranch, and that appellant's reputation for truth and veracity was very good (Tr. 87). On cross-examination, Inspector Leonard testified that between the middle of August, 1928, and December 10th, 1928, he had had occasion to communicate with appellant almost daily and never had any delay or difficulty in getting in touch with him. (Tr. 88, 89.)

Arthur Molsworth, another character witness, a resident of Portland for 39 years, testified he had known appellant for 9 years; that he had loaned appellant up to $3,000 at times without security, that he knew of appellant's hauling garbage to his hog ranch; and that appellant's reputation for truth and veracity was good. (Tr. 96, 97.)

E. C. Heidtbrink, of the Sunset Feed Mills, testified that he had supplied appellant with hog and pigeon feed from June 1st, 1927, and that his financial dealings were satisfactory. (Tr. 100.)

A. B. Smith, testified that he had sold appellant a truck and six garbage wagons for use in connection with appellant's ranch and that appellant always met his agreements. (Tr. 103, 104.)

Dr. James M. Douglas, a veterinary surgeon who attended appellant's sick animals, testified about appellant's farm and further that appellant's reputation for truth and veracity was good. (Tr. 104, 105.)

C. F. Nichols, a salesman at the Stock Yards, testified to buying and selling truckloads of hogs for appellant during three years immediately preceding. (Tr. 106.)

J. H. Wellington, former sheriff of Columbia County, testified that appellant's reputation for truth and veracity was good. (Tr. 108.)

After hearing the foregoing testimony, the Commissioner deemed himself bound by the indictment and the testimony of Hargrove, and bound appellant over to the District Court for removal. (Tr. 110.)

Appellant thereupon petitioned the District Court for a writ of habeas corpus and a writ of certiorari to review the action of the Commissioner. (Tr. 3-8.) The District Court, however, refused to review the testimony and, upon the record, ordered appellant removed. (Tr. 115.) From this order, Thomas Johnson has appealed to this Court. (Tr. 115.)

ASSIGNMENT OF ERRORS

The assignment of errors is as follows (Tr. 116):

I.

That the Court erred in denying the writ of habeas corpus on the ground that there was no evidence introduced before the Court or the Commissioner showing probable cause for removal, but on the contrary, the evidence introduced by the United States Government showed the absolute absence of any evidence showing probable cause.

II.

That the Court erred in granting the order of removal by reason of the fact that there was no evidence introduced before the United States District Court showing probable cause for removal.

III.

That the Court erred in ruling that an indictment and identification of the petitioner was sufficient for removal.

IV.

That the Court erred in holding that the petitioner had been identified. The evidence showed that none of the witnesses produced had any knowledge as to any participation in said conspiracy by said petitioner.

V.

That the Court erred in not considering the testimony as a whole, introduced before said Commissioner.

VI.

That there was and is a total failure of proof of the United States Government for removal.

ARGUMENT

The foregoing assignments of error may be discussed under one heading: That, upon the entire record, the want of probable cause was so clearly shown that the Commissioner and the District Court were guilty of an abuse of discretion in committing appellant and ordering his removal for trial.

We do not dispute, of course, that this Court should not inquire into the mere question of the weight of evidence before the Commissioner. Neither do we contend that if the Commissioner had refused to hear evidence of a defensive character we could have complained. The latter proposition, we concede, is settled by *U. S. ex rel. Hughes vs. Gault,* 271 U. S. 142. The former proposition we believe to have been correctly determined in *Parker vs. U. S.* (C. C. A. 9), 3 Fed (2d) 903, and in *Rowe vs. Boyle* (C. C. A. 9), 268 Fed. 809.

What we do contend is that where the Commissioner has heard evidence, and all the evidence that has been considered in making the order of removal is brought before this Court, that this Court should reverse the decision of the District Court, where the finding of the District Court and of the Commissioner is so clearly against the evidence as to amount to an abuse of discretion. The foregoing cases last cited, it seems to us, indicate clearly that such is the law.

We believe, further, that the instant case falls squarely within the decision of the Circuit Court of Appeals of the Third Circuit in *U. S. ex rel. Mayer vs. Glass* (Nos. 3730 to 3736), 25 Fed. (2d) 941, 943, insofar as that decision discusses the cases of Dooley and Purcell. In that case, the Court held that where the government elected to plead its overt acts so extensively, it was bound thereby and if an overt act as pleaded showed no offense against the defendant sought to be removed, no order of removal should have been made. In the instant case, thirteen overt acts are pleaded. They affect every defendant except Thomas Johnson. His name is not even mentioned therein. The instant case is even stronger than the *Glass* case, and the conclusion would seem to follow, *a fortiori.*

With reference to the substantive offense charged in Count II, it is sufficient to say that the entire evidence conclusively shows that appellant was never within the jurisdiction of the court in which the indictment was returned during the period of the alleged offense.

As stated above, if the Commissioner had heard no evidence, the indictment and the categorical identification of appellant (however shaken on cross-examination) by Hargrove would probably have been sufficient to authorize removal. But when the Commissioner heard evidence going to negative probable cause, that *prima facie* case was overcome.

> *U. S. vs. Mathues* (D. C. Pa.), 12 Fed. (2d) 787;
> *Re Richter* (D. C. Wis.), 100 Fed. 295;
> *U. S. ex rel. Brady vs. Hecht* (C. C. A. 2), 11 Fed. (2d) 128.

As the Court says in the last-cited case:

> "In this case we have seen that the government did not rest upon the probative force of the indictment, but availed itself of its right to offer testimony in support thereof." (Pp. 135-6.)

Having elected to introduce evidence, the government was bound to show probable cause. Far from doing that in the instant case, the entire record conclusively shows the want of probable cause. Hence there

was an abuse of discretion in the order below, which this Court should, in our opinion, correct.

In the removal proceedings, the Commissioner and the District Judge exercised judicial and not ministerial functions.

U. S. vs. Yount (D. C. Pa.), 267 Fed. 861;
U. S. vs. Morse (D. C. Conn.), 287 Fed. 906, 915;
U. S. vs. Mathues (D. C. Pa.), 6 Fed. (2d) 149, 150;
Brady vs. Hecht (C. C. A. 2), 11 Fed. (2d) 128, 132, 133.

In the exercise of that function, ordinarily the decision of the District Judge is conclusive, to be sure; but when, as here, there has been a clear abuse of that discretion, the order should be reversed. As the Court said in the *Mathues* case, supra (p. 151):

> "Where the net result is to raise a doubtful question of law, or an issue of fact that should be tried by a jury, the warrant should issue; but, where the averments of the indictment on any of the three essential elements are overcome by rebuttal proof so clear and convincing as to leave no reasonable room for doubt, the removal should be refused. (Citing cases.)"

By the same token, in such a case, where the trial judge clearly abuses his discretion, as here, the Appellate Court should reverse the decision.

Respectfully submitted,

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